Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-164

LOUISE M. ROCHELLE, Individually and as Administratrix of the Estate of William Paul Rochelle,
Petitioner,

vs.

JUBETH FRENCH and JO RUTH RILEY WALLACE,
Executrix of the Estate of Buford F. Wallace,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee

FRIERSON M. GRAVES, JR.
2020 First Tennessee Bank Building
Memphis, Tennessee 38103
(901-525-8231)

WILLIAM H. FISHER, III
2112 First Tennessee Bank Building
Memphis, Tennessee 38103
(901-525-5671)

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the Supreme Court of the State of Tennessee

The Petitioner, Louise M. Rochelle, respectfully prays that a Writ of Certiorari issue to review the final judgment in these causes resulting from the action of the Supreme Court of Tennessee in denying Certiorari and denying a timely Petition for Rehearing. The Order denying the Petition for Rehearing was entered by the Supreme Court of Tennessee on May 1, 1978.

OPINION BELOW

The Orders of the Tennessee Supreme Court denying Certiorari and denying the Petition for Rehearing were both rendered without opinion and have not been published. Copies of all of these orders appear in the appendix. The effect of the action of the Tennessee Supreme Court in denying the Petition for Certiorari left in effect a judgment of the Western Section of the Tennessee Court of Appeals which was rendered pursuant to an opinion which has not yet been reported. A copy of that opinion appears in the appendix hereto.

JURISDICTION

The judgment of the Western Section of the Tennessee Court of Appeals was entered on August 25, 1977. The order of the Tennessee Supreme Court denying certiorari was entered on May 1, 1978.

A timely petition for rehearing was filed by the Petitioner in the Tennessee Supreme Court in which the Petitioner urged that the action of that Court constituted a denial of procedural due process guaranteed her by the 14th Amendment to the United States Constitution. The pertinent language of the petition was as follows:

> "The Petitioner, Louise M. Rochelle, most respectfully moves this Court for reconsideration (or rehearing) of her Petition for Certiorari, or in the alternative for a Writ of Supersedeas pending an appeal to the United States Supreme Court, on the grounds that the denial of the Petition for Certiorari in the captioned causes constitutes a denial of procedural due process, guaranteed the Petitioner by the 14th Amendment to the United States Constitution."

The order of the Tennessee Supreme Court denying the petition for certiorari was entered on May 1, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

In a dispute with the Respondents over funds paid into the Registry of the Court, the Petitioner asserted six grounds of recovery, each constituting a separate and distinct cause of action. The Trial Court ruled in the Petitioner's favor on one of these theories and since the Petitioner took all of the funds under its ruling on this theory, it expressly declined to rule on the others. The Respondent appealed to the Court of Appeals where the review is theoretically de novo. The Court of Appeals reversed the Trial Court on the grounds that the Trial Court had erred in its ruling on the one theory passed on by it, but the Court of Appeals did not rule on the merit of the Petitioner's other theories. The Supreme Court denied certiorari and denied a timely petition for rehearing. The question presented is whether the failure of any state court to rule on the merit of Petitioner's other theories of recovery constitutes a deprivation of procedural due process guaranteed her under the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The 14th Amendment to the United States Constitution provides in pertinent part as follows:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The Petitioner Louise M. Rochelle married her husband, Dr. William Paul Rochelle, in 1940 and they were "blissfully happy" until sometime in the early 50's when Dr. Rochelle became involved in an affair with an employee, the Respondent, Jubeth French, who willfully and wantonly alienated the affections of Dr. Rochelle and regularly engaged in criminal conversation with him. As a result, Dr. Rochelle, who had previously been a loving generous husband, became niggardly and abusive toward Mrs. Rochelle, causing her life to be a "living hell" for almost 20 years prior to the death of Dr. Rochelle in 1969.

Over the years Dr. Rochelle impoverished himself in supporting Miss French and in supporting various ill fated business ventures in which she was involved. In his latter years Dr. Rochelle suffered from congestive heart failure, and when the imminence of his death became obvious, Miss French, in a manner constituting undue influence, brought pressure to bear on Dr. Rochelle to give her money, which she contended at the trial was due her for wages that Dr. Rochelle had been unable to pay her in her lifetime, although the records of Dr. Rochelle clearly indicated that she had been paid in full for the services rendered to Dr. Rochelle as an employee. Dr. Rochelle was then insolvent and had no assets to give Miss French. To pacify her, he acquired three term life insurance policies which were made available to him through the local medical society on a non-medical basis, named his friend, the Respondent, Dr. Buford F. Wallace, the beneficiary of the policies and, according to both Miss French and Dr. Wallace, extracted a verbal promise from Dr. Wallace to pay Miss French out of the proceeds of the policies the wages due her, an amount which neither Miss French nor Dr. Wallace was able to either calculate or estimate at the trial.

Dr. Rochelle remained insolvent from that time until the time of his death and was therefore insolvent at the time of the payment of all of the premiums on the above mentioned policies. At his death Dr. Rochelle's estate was so far insolvent as to be unable to pay Mrs. Rochelle a widow's year support due her by statute.

Following Dr. Rochelle's death, Mrs. Rochelle learned for the first time of the insurance policies and of her husband's illicit affair with Miss French, and asserted a claim against Dr. Wallace for the proceeds of the policies. Dr. Wallace, who had "double dated" with Dr. Rochelle and Miss French, and therefore may have been blackmailed, had made an unsecured loan of $25,000.00 to Miss French shortly following the death of Dr. Rochelle which he admittedly had no hope of collecting except out of the proceeds of the insurance. Accordingly, instead of interpleading the funds as an impartial stakeholder might have done, he sought affirmative approval of the Court to pay the insurance proceeds to Miss French pursuant to an alleged parole trust. The insurance proceeds were ultimately paid into the Registry of the Court by Dr. Wallace, and with the interest that has been earned since that time the sum now in the Registry of the Court in the case is $67,368.38.

Mrs. Rochelle, individually and as administratrix, asserted seven separate theories which she contended entitled her to recover the insurance proceeds, each of which could have been maintained by her as a *separate cause of action* but for applicable rules of joinder. They were as follows: (1) That since Dr. Rochelle had allegedly told Dr. Wallace the insurance money was to be used to pay Miss French what was due her in back wages, and since that amount could not be calculated or estimated, the trust must fail because of the vagueness of its terms regarding disposition of the res; and that the res should, therefore, be held by Dr. Wallace pursuant to a resulting trust in favor of the next of kin of Dr. Rochelle, represented by Mrs.

Rochelle as Executrix; (2) That the insurance proceeds in the hands of Miss French represented the fruits of the tort of alienation of affections perpetrated by Miss French against Mrs. Rochelle, and that the same should, therefore be held pursuant to a constructive trust in favor of Mrs. Rochelle individually; (3) That the insurance proceeds in the hands of Miss French represented the fruits of the tort of criminal conversation perpetrated by Miss French against Mrs. Rochelle and that the same should, therefore, be held by her pursuant to a constructive trust in favor of Mrs. Rochelle individually; (4) That the insurance proceeds in the hands of Miss French constitute the fruits of the wrong of undue influence perpetrated by Miss French against Dr. Rochelle, and that the same should, therefore, be held by her pursuant to a constructive trust in favor of the next of kin of Dr. Rochelle, represented by Mrs. Rochelle as Administratrix; (5) That the attempted conveyance of insurance proceeds to Miss French represented a conveyance by Dr. Rochelle intended to defeat the statutory rights of Mrs. Rochelle as his widow, and that the same should be set aside on the authority of Tennessee Code Annotated §31-612; rendering such conveyance voidable as to the widow; (6) That the attempted conveyance of insurance proceeds to Miss French was a fraudulent conveyance as defined in the Uniform Fraudulent Conveyances Act and should be set aside on the authority of that Act, which renders such conveyances void as to creditors, generally, whom Mrs. Rochelle represents as Administratrix; and (7) That Miss French, being guilty of alienation of affections and criminal conversation, should respond in damages to Mrs. Rochelle for these torts against her; and that the insurance proceeds in the hands of Miss French should be subjected to a garnishment in favor of Mrs. Rochelle for the satisfaction of her claim for damages.

Miss French demurred to the separate claim of Mrs. Rochelle for damages for alienation of affection and criminal conversation and the demurrer was sustained on the grounds that that

claim was multifarious or repugnant to the other claims. That claim was then made the subject of a separate suit in the same Court which has been treated as a companion case and will be referred to herein as the "companion case" to distinguish it from what will be referred to as the "main case" although the trial court refused to consolidate the two cases for trial.

Following a lengthy trial in the main case the trial court ruled in Mrs. Rochelle's favor on the resulting trust theory, the first of those mentioned above, and said in its opinion that, since Mrs. Rochelle took all the insurance proceeds pursuant to that theory, it was not necessary for the court to rule on the other theories. In the language of the court:

> "Since Dr. Rochelle died intestate and Mrs. Rochelle will acquire the entire estate of Dr. Rochelle under the laws of descent and distribution, the Court feels that it is unnecessary to make findings and conclusions with respect to the other theories and contentions of Mrs. Rochelle."

The full text of the opinion is set forth in the appendix.

Under Tennessee law the appeal of the Respondent in the main case theoretically required a de novo review of the entire case by the Court of Appeals, that is, an examination by the Court of Appeals of all of the law and fact raised by the pleadings below; provided, that the Chancellor's findings were to be accorded a presumption of correctness; and provided, further, that the Chancellor's findings as regards conflicts in oral proof were to be regarded as conclusive:

Thus, T.C.A. §27-301 provides in part as follows:

> "Either party dissatisfied with the . . . decree of the . . . chancery court may appeal to the . . . Appeals Court, and have a re-examination in that court of the whole matter of law and fact appearing in the record."

T.C.A. §27-303 provides in part as follows:

> "All cases tried . . . in a court of equity . . . jurisdiction to review which is in the Court of Appeals, shall be reviewed upon a simple appeal, as now provided in equity cases . . . In all such cases the hearing of any issue of fact or of law in the appellate court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the judgment or decree of the trial court, unless the propondence of the evidence is otherwise."

Since the Petitioner took all of the insurance proceeds under the ruling in the main case the companion case was rendered moot and the Court granted a summary judgment for the Respondent in that case. The Respondent appealed from the judgment in the main case which necessitated an appeal by the Petitioner from the judgment in the companion case. The two cases have been consolidated through the appellate process.

The statutes set forth above have been interpreted by the Supreme Court of Tennessee as meaning that on appeal from a case in which the claimant was successful, the question in the Court of Appeals is whether there is any theory asserted by the claimant upon which the decision of the trial court may be sustained, in which event, the decree should be affirmed. Thus in *Weeks v. Summerland*, 466 S. W. 2d 894 (Tenn. App. 1970) (Cert. Den. 1971) the Tennessee Supreme Court said:

> "The Chancellor found for the complainant, which means he resolved all necessary issues of fact in favor of complainant. If there was any theory of facts upon which the decree may be sustained, it must be done."

Being apparently unmindful of the scope of review in the Court of Appeals, the Respondent, Miss French, urged upon the Court of Appeals only *one* assignment of error and that was that the trial court erred in its holding favorable to the Petitioner

in connection with the *one* cause of action ruled on by the trial court. In the language of the Court of Appeals:

> "The single assignment of error of Jubeth French is that the Chancellor erred in holding that the admitted oral trust failed because of vagueness." (The full text of the opinion is set forth in the appendix).

The Respondent's assignment of error was thus patently insufficient as the basis for reversal and the Respondent's appeal should have been dismissed accordingly. In her brief in the Court of Appeals the Petitioner pointed out the obligation of the Court of Appeals to hear the case be novo and specifically requested findings and an adjudication with respect to those causes of action not ruled on by the trial court.

However, the Court of Appeals, succumbing to the simplicity of the "one assignment" approach to the case of the Respondent, reviewed only the law and evidence relating to the one assignment of error made by the Respondent, sustained that assignment, reversed the decision of the trial court, and directed the entry of a judgment in favor of the Respondent, Miss French, without ruling on any of the Petitioner's other theories of recovery. In the language of the opinion of the Court of Appeals:

> "We are of the opinion that *the* assignment of error is well taken and should be sustained . . . The result is that [the Respondent] is to receive the insurance proceeds . . ."

The Court of Appeals simply ignored its obligation (and Petitioner's specific request) to adjudicate the rights of the Petitioner under the other causes of action asserted by her, which, with one or two exceptions, were much stronger than that dealt with by the Court of Appeals both in terms of the merit of the theory and the proof supporting the same.

The Court of Appeals affirmed the summary judgment for the Respondent in the companion case.

Your Petitioner petitioned the Supreme Court of Tennessee for certiorari in both cases but certiorari was denied, despite the long standing tradition in that court to grant certiorari in cases involving disparate results below.

Thus it may be seen that the Petitioner was denied a hearing by the state courts at every level with respect to five of the six remaining causes of action which were asserted in the main case.

The Petitioner filed a timely petition for rehearing in the Tennessee Supreme Court in which she urged that the failure to give her a hearing with respect to her other causes of action constituted a deprivation of procedural due process guaranteed her under the 14th Amendment of the United States Constitution, thereby raising the federal question which is the basis for the invocation of the jurisdiction of this Court. (The language of the petition raising the federal question is set forth verbatim in the section of this petition styled "JURISDICTION".)

As indicated, the Supreme Court of Tennessee entered an order on May 1, 1978, denying the petition for rehearing without rendering an opinion.

REASONS FOR GRANTING THE WRIT

The refusal of the state courts upon request to render a decision with respect to five of the six separate and distinct causes of action asserted by her in the main case constitutes action which is not in accord with applicable decisions of this court.

By depriving the petitioner of an adjudication with respect to five causes of action asserted by her, the courts of Tennessee effectively deprived her of a hearing with regard to same; and the right to a hearing is one of the fundamental rights guaranteed by the due process clause of the 14th Amendment to the United States Constitution. Thus in 16 Am. Jur. 2d, Constitutional Law, at §569 it is said:

> "An opportunity for hearing is one of the essential elements of due process . . ."
>
> (citing numerous cases from this Court and others)

To the same effect is the following from Antieu, Modern Constitutional Law at §7:14 wherein it is said:

> "The United States Supreme Court has referred to 'the right to be heard' as 'one of the most fundamental requisites of due process' ".

Again, it has stated:

> "A fundamental requirement of due process is the opportunity to be heard."

The right to a hearing includes the right to raise all such theories as a party may have in a cause. Thus in 16 Am. Jur. 2d, Constitutional Law, at § 574 it is said:

> "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause."

Obviously the right to a hearing necessitates an *adjudication* of the rights asserted by a party; for otherwise, what good is a hearing? Thus in *Bennett v. Davis*, 90 Me. 102, 37 A. 864 (Maine S. Ct. 1897) it was said:

> "The phrases 'law of the land' and 'due process of law,' as used in the constitutions, are similar in meaning. They both imply *a judgment* by an authorized tribunal after an opportunity for a hearing. There must be some sort of a tribunal, some opportunity for a hearing, and some sort of an *adjudication*. These requirements, at least, are engrained in the fundamental law." (emphasis added)

To the same effect is the following from *Wilson v. Pest Control Commission of Florida*, 199 So. 2d 777 (Fla. Dist. Ct. of Appeal, 1967):

> "Daniel Webster most aptly said 'Due process of law means a law which hears before it condemns which proceeds upon inquiry and *renders judgment* after trial.'" (emphasis added)

A case illustrating the application of the doctrine under discussion is the decision of this Court in *Saunders v. Shaw*, 244 U. S. 317, 37 Sup. Ct. 638 (1917). There, the Plaintiff offered evidence at the trial in a state court which was ruled inadmissible. There was a judgment for the Defendant. On appeal to the highest court of the state, it was held that the evidence rejected below was admissible, and, on the basis thereof, a judgment was entered in favor of the Plaintiff. The Defendant appealed this result to this Court, which held that the Defendant had been denied procedural due process in that he was never given an opportunity to rebut the evidence held inadmissible by the trial court.

It is submitted that the Petitioner in this instant case, having been deprived of an adjudication in five separate and distinct

causes of action asserted by her presents a much stronger case of denial of procedural due process than in the *Shaw* case, *supra*.

The issue presented by the case at bar has significance which transcends the facts of the case and is of *vital* interest to lawyers and litigants everywhere for the following reasons:

The trial of the instant case was a lengthy one and the record was voluminous. To adjudicate all of the theories of recovery or causes of action asserted by the Petitioner would require a very painstaking and time consuming scrutiny of the record by a judge. The trial judge had an excuse for his failure to render a decision with respect to all of the theories asserted by the Petitioner inasmuch as his decision in favor of the Petitioner on the one theory rendered the others moot. The Court of Appeals had no such excuse, and since its obligation to review the case de novo was called to its attention by the Petitioner, one must conclude that the Court of Appeals declined to render a decision with respect to five of the six causes of action asserted by the Petitioner in the main case because it was simply not willing to take the time and effort required to do so. To add insult to injury, the Court of Appeals declined to remand the case to the trial judge for ruling on the other theories for the reason that to do so would call attention to its failure to fulfill its obligation to make such an adjudication. The Supreme Court, realizing that it could not require the Court of Appeals or the trial court to correct the problem without itself undertaking the monumental task of reviewing a gargantuan record, managed to avoid this unpleasant task by exercising its discretion to deny certiorari without opinion.

Unfortunately, as the case load of the appellate courts of the country increases due to the proliferation of litigation spawned by the growing complexity of our society, the tendency of appellate courts to fail fully to dispose of the issues before them has almost become the exception rather than the rule. This

phenomenon is made possible by the feeling on the part of the appellate judges that there is, after all, no one in a position to do anything about their dereliction of duty.

No one will deny the need to do something about sometimes intolerable case load with which most of our appellate judges are saddled. But, rendering decisions without disposing of all of the issues is hardly the answer.

By letting the state appellate judges know that it will not tolerate the failure to dispose of issues as a means of dealing with the problem, this Court can in one fell swoop both curb a deplorable practice, which threatens to undermine the very foundation of our judicial system, and focus attention on the need to deal with the problem in a more constructive and constitutional fashion.

CONCLUSION

For these reasons the writ of certiorari should issue to review the judgment of the Supreme Court of the State of Tennessee.

Respectfully submitted,

FRIERSON M. GRAVES, JR.
2020 First Tennessee Bank Building
Memphis, Tennessee 38103
(901-525-8231)

WILLIAM H. FISHER, III
2112 First Tennessee Bank Building
Memphis, Tennessee 38103
(901-525-5671)

Counsel for Petitioner

Certificate of Service

I do hereby certify that on this 27 day of July, 1978, I have served the foregoing Petition for Certiorari on the Respondents by mailing three copies of same, postage prepaid, to J. W. Kirkpatrick, 1910 First Tennessee Bank Bldg., Memphis, Tennessee 38103, counsel for the Respondent Jubeth French, and Marvin Goff, 2103 Clark Tower, Memphis, Tennessee 38137, counsel for the Respondent Jo Ruth Riley Wallace, Executrix.

WILLIAM H. FISHER, III
2112 First Tennessee Bank Building
Memphis, Tennessee 38103
Counsel for Petitioner

APPENDIX

In the Court of Appeals of Tennessee
Western Section at Jackson

Buford F. Wallace,
Appellee,
vs.
Louise M. Rochelle, Individually and as Administratrix of the Estate of William Paul Rochelle, and Jubeth French,
Appellants.

Shelby Equity
No. 72418-1 R.D.

Louise M. Rochelle,
Appellant,
vs.
Jubeth French,
Appellee.

Shelby Equity
No. 76213-1 R.D.

(Filed July 29, 1977)

From Part I of the Chancery Court of Shelby County, Tennessee
Honorable Robert A. Hoffmann, Chancellor

Marvin C. Goff of Memphis, Tennessee, for Buford F. Wallace

William H. Fisher, III and David J. Harris of Memphis, Tennessee, for Louise M. Rochelle

J. W. Kirkpatrick and Max D. Lucas, Jr. of Memphis, Tennessee, for Jubeth French

AFFIRMED IN PART, REVERSED IN PART

Opinion filed: July 29 1977

NEARN, J.

CARNEY, P. J. (Concurs)
MATHERNE, J. (Concurs)

William Paul Rochelle at age 61 died intestate without issue on January 6, 1969, and his wife, Louise M. Rochelle, was appointed administratrix of the estate.

In April of that year, Buford F. Wallace filed suit in Cause No. 72418-1 R.D. in the Chancery Court of Shelby County for declaratory judgment and construction of an oral trust; naming as defendants Louise M. Rochelle, individually and as administratrix of her husband's estate, and one Jubeth French. The complaint alleged that William Paul Rochelle had acquired policies of life insurance on his own life in the total amount of $45,000 with Buford F. Wallace named as sole beneficiary on the face of each of the policies. The complaint further alleged that plaintiff, Buford F. Wallace, had received the $45,000 but he did not hold same in his own right because by oral instruction, the deceased had expressly directed plaintiff to hold such funds in the capacity of trustee for the benefit of Jubeth French and that plaintiff had accepted the obligation of the trust. Further, that both Jubeth French and Louise M. Rochelle had made demand upon him for the funds. The complaint prayed that the Court determine and declare the rights of the parties.

French answered and admitted that an oral trust had been established in her favor.

Louise M. Rochelle, individually and as administratrix, filed her answer coupled with a cross-claim. The answer admits "that William Paul Rochelle expressed a desire to have the complainant serve as Trustee of an oral testamentary trust, but denies the allegation that he intended to create said trust for the sole benefit of Jubeth French, there being considerable doubt as to what his intention was" and alleged that the terms of the oral trust were too vague to be enforced. The cross-claim charged Jubeth French, among other things, with alienation of affection, criminal conversation and the exercise of undue influence to obtain the issuance of the life insurance policies. The cross-claim

sought compensatory and punitive damages and in the event of recovery, execution against the $45,000 in the hands of Wallace.

After numerous skirmishes among the parties via the pleadings, the Chancellor ordered stricken so much of Louise M. Rochelle's cross-claim which sought recovery on the theories of alienation of affection and criminal conversation. Then, counsel for Louise M. Rochelle filed a separate cause of action for alienation of affection and criminal conversation in the same Chancery Court in Cause No. 76213-1 R.D. and sought to have the "new" cause consolidated with Cause No. 72418-1 R.D. The Chancellor denied the motion to consolidate the causes. Cause No. 76213-1 R.D., the alienation of affection suit, remained dormant until Cause No. 72418-1 R.D. had been concluded. At the conclusion of the proof in Cause No. 72418-1 R.D., the Chancellor, sitting without a jury, found that a valid oral trust did exist and the purpose of the trust was to reimburse Jubeth French for unpaid salary, but the exact amount of such unpaid salary could not be ascertained and the trust therefore failed for uncertainty and the $45,000 would go to the Rochelle estate as a "resulting trust." Then, the Chancellor denied recovery in the alienation of affection suit (Cause No. 762[illegible]) holding that it was barred by the statute of limitations.

French appeals from the Chancellor's holding that the trust failed for uncertainty. It would seem that as a "stop-gap" ploy, Louise M. Rochelle has appealed from the adverse decision in the alienation of affection suit; just in case French should be successful on her appeal.

The foregoing is only a synopsis of what we consider to be the more important pleadings and we think sufficient for an understanding of our treatment of the matter.

There has been filed on behalf of Louise M. Rochelle a motion to strike the Bill of Exceptions. The motion is completely without merit and is accordingly overruled.

The single Assignment of Error of Jubeth French is that the Chancellor erred in holding that the admitted oral trust failed because of vagueness. We are of the opinion that the Assignment of Error is well taken and should be sustained.

It should first be noted that everyone concerned, i.e., Miss French, Mrs. Rochelle and Buford F. Wallace, admitted that Wallace held the $45,000 pursuant to an oral trust. Buford F. Wallace had died by the time this matter came on for a hearing, but his discovery deposition had been taken by counsel for Mrs. Rochelle. Over the objection of counsel for Rochelle, Wallace's discovery deposition was read into evidence. Wallace's deposition testimony was that Dr. Rochelle desired that he, Wallace, be named as sole beneficiary in certain policies of insurance with the understanding and condition that upon Rochelle's death, Wallace, acting in a fiduciary capacity, was to deduct anything owed to him by Rochelle from the policy proceeds and to pay the balance over to Jubeth French.[1] Wallace further testified that Dr. Rochelle told him that Jubeth French had worked for him for years, had not been properly paid for her loyal efforts and the insurance money was to repay her for same.[2] The following statement was attributed to Dr. Rochelle by Wallace: "I owe Miss French Seventy-Five Thousand dollars, at least Seventy-Five Thousand dollars, and I'm going to make out some insurance policies and I want you to see that Miss French gets them." Wallace testified that he was reluctant to accept the trust, but that upon the insistence of his friend, Rochelle, who pleaded that Wallace was the only one he could trust to carry out his wishes, he did agree

[1] Wallace and Dr. Rochelle had been close friends for many years and had in times past borrowed and repaid money from and to each other. At the time of Dr. Rochelle's death he was not indebted to Wallace.

[2] Dr. Rochelle had invested in several business ventures, all of which had ended as dismal failures. Jubeth French had worked for Dr. Rochelle in a jewelry store venture and an apothecary or drugstore business, neither of which earned enough to pay expenses.

to act as trustee. (Dr. Rochelle and his wife did not get along well as evidenced by (1) that for more than 15 years prior to his death, they had not slept together and (2) the alienation of affection suit filed by Mrs. Rochelle. We think it not unwarranted to conclude that Dr. Rochelle did not want Mrs. Rochelle to find out that he had procured life insurance policies with Jubeth French as ultimate beneficiary.)

In addition to the testimony of Wallace regarding the establishment of the trust, Elbert Hymer testified that he had heard Wallace and Dr. Rochelle discussing the trust and heard Dr. Rochelle state that the insurance funds were to be paid over to Jubeth French in the following manner:

> ". . . you know a lady that worked for me by the name of Jubeth? I said, yes. He says, well, I have taken an insurance policy out on my life and I have made Buford the beneficiary to the policy in the event of my death to turn the money over to Jubeth, the lady that had worked for him.
>
> "Anyhow, he said something about, he felt he owed her a debt. He didn't elaborate on what it was one way or the other."

Miss Vernell Marlar testified that Dr. Rochelle stated that he owed Miss French "more than I could pay her if I had a hundred thousand dollars because she has been the best employee and the most trustful employee that I have had." Dr. Rochelle then told Miss Marlar of the purchase of the insurance policies in order to repay Miss French.

Counsel for Louise M. Rochelle convinced the Chancellor that the purpose of the trust was to repay Miss French for the exact unpaid amount owed her for her loyal work and since Miss French could not prove that exact amount, the trust must fail. We believe counsel and the Trial Court have confused

the deceased's motivations with his expressed intentions and desires. The motivation behind the establishment of the trust was the fact that Dr. Rochelle had not always been able to pay Miss French her salary when it was due, yet she remained loyal and continued to work for him. That motivation constituted a reason "why" for the establishment of the trust. It did not constitute the "what" or the terms of the trust.

An oral testamentary trust in insurance benefits is valid in this state. *Cook v. Cook* (1975 Tenn.), 521 S.W. 2d 808. However, the terms and conditions of the oral trust must be clearly proved. *Cook v. Cook; Seaton v. Dye* (1953 E.S.), 37 Tenn. App. 323, 263 S.W. 2d 544. We are unable to find any proof that it was Dr. Rochelle's intention that the terms of the trust required the beneficiary to prove exactly what was owed her in unpaid salary. The proof of Dr. Rochelle's intention is to the contrary. Dr. Rochelle himself placed the value upon Miss French's loyal services by taking out and placing in trust, life insurance policies in the amount of $45,000, subject only to any reduction made by the settlor by borrowing from Buford F. Wallace. The proof is that it was Dr. Rochelle's intention that the corpus was to reward Miss French for her loyal services paid and unpaid. There is no proof that the trustee was to pay to Miss French only that which she could prove due her as unpaid salary. The value of Miss French's loyal services were fixed by the settlor at $45,000. We find nothing vague or uncertain about it.

In defense of the results below, counsel for Mrs. Rochelle takes the position that the ultimate result reached by the Chancellor in Cause No. 72418-1 R.D. was correct because the Chancellor never should have admitted the deposition of Wallace into evidence by which deposition the terms of the trust were sought to be proved. Without this deposition, it is contended, there is no proof of the establishment of the trust. It is then argued that since the Chancellor could not properly

consider that proof, this Court may not consider the Wallace deposition in a *de novo* review. Counsel cites to us numerous technical reasons he claims will require the deposition to be excluded. Some are quite ingenious, although strained, in their concept. The principal argument is that the Wallace testimony violates the dead man's statute (T.C.A. § 24-105). This is sort of a "play within a play" argument, since counsel seems to argue that since Wallace is a party to the suit, if alive, he would be barred from testifying about Rochelle's statements since Rochelle is dead and, in addition, since he, Wallace, is now dead, Wallace's statements would also violate the statute.

All of the argument based upon an alleged violation of the dead man's statute overlooks one basic principle. Mrs. Rochelle individually and as administratrix, has admitted that an oral trust was established.

In other words, she admits that part of Dr. Rochelle's conversation that shows his intent to establish a trust. She may not admit only part of the words of the deceased in a transaction, which words are not injurious to her, and then exclude that part of the testimony that is unfavorable to her. What counsel would have the Court do is, in effect, admit the testimony of a deceased such as, "I establish a trust upon the following terms and conditions:" and then, under the guise of the dead man's statute, exclude all conversation after the colon. No court of equity should permit such action and the Chancellor did not err in permitting the introduction of the Wallace deposition.

For legal reasons as well, the dead man's statute has no application. We do not believe the estate of Rochelle is the real, or for that matter, a necessary party to this action. T.C.A. § 56-1108, as it existed at the time of Dr. Rochelle's death, provided that life insurance on a husband's life inured to the benefit of his widow "without being in any manner subject to the debts of the husband." Therefore, since Wallace disclaims the

insurance proceeds, even if the trust were to fail, the corpus of the trust proceeds of the insurance policies would not be received by the administratrix as funds subject to administration and division among creditors, but would inure to the benefit of the widow personally. See *Cook v. Cook*, supra; *Chrisman v. Chrisman* (1918), 141 Tenn. 424, 210 S.W. 2d 956.

Furthermore, even if the Wallace deposition were not considered, the trust and its terms were proved by witnesses who were not parties to the suit, e.g., Elbert Hymer and Vernell Marlar. The statute only applies to the testimony of parties. *In Re Estate of McClanahan* (1971 W.S.), 63 Tenn. App. 301, 471 S.W. 2d 555.

Counsel for Mrs. Rochelle also argues in support of the result reached that Dr. Rochelle's estate is insolvent and that the purchase of the insurance policies was done to defraud a creditor. We are not satisfied from the record that the Rochelle estate is insolvent or that the wife can occupy the status of a creditor in this instance. Further, we find no proof from which it could reasonably be concluded that the payment of insurance premiums by Dr. Rochelle rendered him insolvent during his lifetime.

For the reasons given, we sustain the Wallace Assignment of Error.

Turning to Mrs. Rochelle's appeal in the alienation of affection case. After the proof in the trust case had been concluded, a motion to dismiss or in the alternative, for summary judgment, was filed in the alienation of affection suit by the defendant, Jubeth French. The basis for the motion was that the claim of Mrs. Rochelle for alienation of affection and criminal conversation was barred by the limitation of one and three years respectively, as set out in T.C.A. §§ 28-304-305. The motion was considered by the Chancellor on the pleadings, the depositions filed in the cause, (which were, for the most part, the same as the depositions filed in the trust case) and the tran-

script of Mrs. Rochelle's testimony taken in the trust case, from all of which the Chancellor concluded, and we concur, that the plaintiff "knew in 1952 from the conduct of her husband and other circumstances that she might have a cause of action against the defendant for alienation of affections (sic) and criminal conversation".

From a reading of Mrs. Rochelle's own testimony and just the admitted facts of the trust case, it is inconceivable to any reasonable mind that Mrs. Rochelle was not aware in 1952 of any cause of action she may have had against Miss French. She admitted in her testimony in the trust case that in 1952 she had found Miss French's wallet in Dr. Rochelle's pants pocket. In fact, she made photocopies of the wallet's contents and kept them just in case they might prove useful. She testified that she was disturbed upon learning that Dr. Rochelle bought Miss French a new car in 1952. Mrs. Rochelle in essence testified that her sexual relations with Dr. Rochelle were satisfactory until Jubeth French came upon the scene. Thereafter, according to Mrs. Rochelle, for 15 years Dr. Rochelle did not sleep with her and treated her miserably. Her own admissions establish the applicability of the statute of limitations.

Mrs. Rochelle's Assignments of Error are overruled.

The result is that Jubeth French is to receive the insurance proceeds, less the fees and expenses previously allowed by the Chancellor.

Costs below and of appeal are adjudged against Mrs. Rochelle individually.

Done at Jackson in the two hundred and first year of our Independence and in the one hundred and eighty-second year of our Statehood.

Nearn, J.

Carney, P. J. (Concurs)
Matherne, J. (Concurs)

In the Court of Appeals of Tennessee
Western Section at Jackson

Buford F. Wallace,
Appellee,
vs.
Louise M. Rochelle, Individually and as Administratrix of the Estate of William Paul Rochelle, Deceased, and Jubeth French,
Appellants.

Shelby Equity
No. 72418-1 R. D.

Louise M. Rochelle,
Appellant,
vs.
Jubeth French,
Appellee.

Shelby Equity
No. 76213-1 R. D.

JUDGMENT

(Filed August 25, 1977)

This cause came on to be heard in the Court of Appeals upon the Assignments of Error and Brief on behalf of Jubeth French, Assignments of Error and Brief on behalf of Louise M. Rochelle, Arguments of attorneys for the parties, and the entire record in the cause, and the Court having considered same and filed its opinion on July 29, 1977, wherein the Court concluded that the Motion of Louise M. Rochelle to strike the Bill of Exceptions should be denied, that the Chancellor erred in holding that the oral trust created by William Paul Rochell, of which Buford F. Wallace was trustee, failed for uncertainty and that, therefore, the proceeds were held by Buford F. Wallace in a "resulting

trust" and should be paid to the Estate of William Paul Rochell, in that the intentions of William Paul Rochell were clear, and there was no uncertainty, and that the intentions of William Paul Rochell should be carried out and the proceeds of the insurance policy held by Buford F. Wallace should be paid to Jubeth French, in accordance with the intentions of William Paul Rochell, and that the Chancellor was correct in holding that the claim of Louise Rochell for alienation of affection and criminal conversation was barred by the statute of limitations, and that the costs in the Chancery Court and in this Court should be assessed against Louise M. Rochell;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Judgment of the Chancery Court as to the holding that the trust created by William Paul Rochell should fail for uncertainty, is reversed and Jubeth French shall receive the proceeds of said trust less fees and expenses allowed in the Chancery Court, and same are to be paid to her, the Judgment of the Chancellor dismissing the action of Louise M. Rochell for alienation of affection and criminal conversation is affirmed, and all costs in the Chancery Court and in this Court are assessed against Louise M. Rochell, for which execution may issue.

Entered this 25th day of August, 1977.

NEARN
Judge

APPROVED:

KIRKPATRICK & LUCAS
By: MAX D. LUCAS, JR.
Attorneys for Jubeth French

ROBERTSON, FISHER, AVERY & DOUGLAS
By: (Illegible)
Attorneys for Louise M. Rochell

In the Supreme Court of Tennessee
At Jackson

Louise M. Rochelle,
Petitioner,
vs.
Jubeth French,
Respondent.
} Shelby Equity

ORDER

(Filed March 20, 1978)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Louise M. Rochelle is denied with concurrence in results only, at cost of petitioner.

PER CURIAM

In the Supreme Court of Tennessee
At Jackson

Louise M. Rochelle,
Petitioner,
vs.
Buford Wallace, et al.,
Respondents.
Louise M. Rochelle,
Petitioner,
vs.
Jubeth French,
Respondent.
} Shelby Equity

ORDER

(Filed May 1, 1978)

Louise M. Rochelle has filed a petition seeking to have this court reconsider her petition for certiorari, or in the alternative, issue a writ of supersedeas pending her appeal to the United States Supreme Court.

On consideration of the petition and reply thereto, this court is of the opinion that there is no merit in the petition for a rehearing and it is accordingly denied.

The alternative petition for supersedeas is granted. A writ will issue from this court staying the enforcement of the judgment of the Court of Appeals for forty-five days from entry of this order so as to permit Mrs. Rochelle to file petition for certiorari in the United States Supreme Court.

Costs incident to the filing of the petition to rehear and the issuance of the writ of supersedeas are adjudged against Mrs. Rochelle and her surety.

PER CURIAM

Supreme Court, U. S.
FILED
AUG 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-164

LOUISE M. ROCHELLE, Individually and as Administratrix of the Estate of William Paul Rochelle,
Petitioner,

v.

JUBETH FRENCH and JO RUTH RILEY WALLACE, Executrix of the Estate of Buford F. Wallace,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

BRIEF FOR RESPONDENT

Jubeth French in Opposition

CLARENCE E. CLIFTON
120 Exchange Building
Memphis, Tennessee 38103
(901) 526-6767
Counsel for Respondent,
Jubeth French

MAX D. LUCAS, JR.
1910 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 523-7656

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

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On Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee

BRIEF FOR RESPONDENT

Jubeth French in Opposition

JURISDICTION

Although Petitioner sought timely review for the lower decisions and her Petition before this Court, substantial questions exist as to whether there is a federal issue, whether it was raised at the first opportunity, and whether the existence of an independent and adequate State ground for the State Court's decisions precludes jurisdiction.

QUESTIONS PRESENTED

I

Whether a substantial federal issue exists.

II

Whether Petitioner's failure to assert the alleged due process violation in her Petition for Certiorari filed in the Supreme Court of Tennessee, precludes review in this Court because she failed to assert the federal issue at the first opportunity.

III

Whether an independent and adequate State ground for the State Court's decisions exists apart from any alleged federal issue, so as to render Petitioner's alleged due process violations moot.

IV

Whether damages, including costs and attorneys fees, should be awarded for the filing of a frivolous Petition for Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part as follows: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This litigation was commenced by the filing of a declaratory judgment action by Dr. Buford Wallace, now deceased, in the Chancery Court of Shelby County, Tennessee, against Louise M. Rochelle, widow of Dr. William Paul Rochelle, and against Jubeth French, alleging that Dr. Wallace was the trustee of the proceeds of insurance policies on the life of Dr. Rochelle, and seeking adjudication as to the party entitled to receive the trust res.

Miss French asserted she was entitled to the proceeds as the beneficiary of the trust, with Mrs. Rochelle asserting that she was entitled to the proceeds because the trust was uncertain and therefore failed, because Miss French was guilty of various wrongful acts constituting alienation of affection, criminal conversation, fraud, and undue influence, and because the conveyance defeated the rights of Mrs. Rochelle as a widow and as a creditor, the estate of Dr. Rochelle being insolvent. After the Chancellor dismissed the tort claims of Mrs. Rochelle, she then filed a separate action against Miss French on these claims.

The Chancellor held that the trust failed for indefiniteness, and, therefore, a trust resulted in favor of Mrs. Rochelle, and that the tort claims were barred by the statute of limitations.

Miss French appealed to the Court of Appeals of Tennessee, Western Section, where, under Tennessee law, the review is de novo, accompanied only by a presumption of correctness of the ruling of the Chancellor. T.C.A. 27-301, T.C.A. 27-303. Mrs. Rochelle appealed the holding of the Chancellor that her tort claims were barred by the statute of limitations.

The Court of Appeals affirmed the holding that the tort claims were barred by the statute of limitations. (A-8, 9) It reversed the holding that the trust failed for indefiniteness, find-

ing that the terms were clear and Miss French was entitled to the trust res, and also holding that the estate was not insolvent. (A-4, 9)

Mrs. Rochelle sought review of the decision of the Court of Appeals by Petition for Certiorari to the Supreme Court of Tennessee, and, in the 293-page Petition, and in the Reply by Jubeth French, every fact, theory, and contention in the lawsuit was thoroughly discussed, and, after considering the Petition, Reply, and the entire record, the Supreme Court of Tennessee denied the Petition for Certiorari.

Thereafter, Mrs. Rochelle filed a Petition to reconsider in the Supreme Court of Tennessee, and there for the first time, claimed that her rights to due process under the Fourteenth Amendment to the Constitution of the United States of America had been violated alleging that the Court of Appeals, because it did not discuss and rule on every factual dispute in the lawsuit, and discuss in detail all of her theories, had failed to consider all of her theories and had denied her appellate review, and that the Supreme Court of Tennessee had denied her appellate review by not granting her Petition for a Writ of Certiorari.

The Petition to reconsider was denied on May 1, 1978. (A-13)

Mrs. Rochelle asserts to this Court that her Fourteenth Amendment due process rights were violated by the Courts below by this failing to consider all of her possible theories of recovery.

ARGUMENT

I

Petitioner asserts that the Court of Appeals of Tennessee in its decision, and the Tennessee Supreme Court in denying her Petition for Certiorari, failed to consider all of Petitioner's grounds for recovery, thereby violating procedural due process. The Court of Appeals, in its opinion, found all of the material facts and legal conclusions which were necessary to dispose of all the theories of Petitioner. It specifically discussed most of Petitioner's theories and the reasons for their rejection and its factual findings and legal conclusions that the trust was valid, that the estate was not insolvent and that the statute of limitations barred the tort claims, were an explicit rejection of most of the theories of Petitioner and an implicit rejection of all of them. (A-1, 9) Its judgment was proper under Tennessee law. Tenn.CodeAnn. Section 27-301, 27-303.

Further the Tennessee Supreme Court, after having the benefit of Petitioner's 293-page brief on her six asserted grounds of recovery, rejected them in denying her Petition for Certiorari and concurred in the result reached in the Court of Appeals.

She is simply seeking to avoid her loss on the merits by interposing an alleged federal issue, which was raised for the first time in a Petition to Reconsider filed in the Supreme Court of Tennessee.

In addition, Petitioner had ample opportunity to raise her alleged due process violation in her Petition for Certiorari to the Supreme Court of Tennessee and having failed to raise such issue, as a matter of Tennessee law, she was precluded in raising same in her Petition to rehear. *City of Nashville v. Wilson,* 88 Tenn 407, 12 S.W. 1082 (1890); *Lawler v. Mc-*

Canless, 220 Tenn. 342, 417 S.W.2d 548 (1967); *City of Morristown v. Sauls*, 61 Tenn App. 677, 457 S.W.2d 601 (1970).

II

Petitioner had adequate opportunity to present any alleged due process violation to the Supreme Court of Tennessee in her Petition for Writ of Certiorari to that Court. No such federal question was raised. It was not until her Petition for Reconsideration of the denial of Certiorari, that she raised her alleged federal question. Having failed to raise the federal issue at the first opportunity, Petitioner is precluded from seeking review in this Court. *Bailey v. Anderson*, 326 U.S. 203, 205-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-244, 78 S.Ct. 1228, 1234, 2 L.Ed.2d 1283 (1958); Wright, Miller, Cooper and Grossman, Federal Practive and Procedure: Jurisdiction, Section 4022 (1977).

III

Even if there existed a federal issue involving the question of denial of procedural due process, the decision of the lower courts is based on independent and adequate State grounds. 16 Wright, Miller, Cooper and Grossman, Federal Practice and Procedure: Jurisdiction, Section 4019 (1977); 32 Am. Jur. 2d, Federal Practice and Procedure, Section 242 (1967). Since as a matter of Tennessee law Respondent has prevailed on the merits under Tennessee substantive law, Petitioner's alleged due process violation is moot.

IV

The Petition for Writ of Certiorari should be denied because there exists no federal question of substance nor any important or special reasons calling for the review of this case. Rule 19 United States Supreme Court Rules.

V

The so-called "federal issue" is so unsubstantial and frivolous, as to justify application by the Court of 28 U.S.C.S. Section 1912 and Rule 56, Subsection 4 of the United States Supreme Court Rules, regarding damages, including costs and attorney's fees.

CONCLUSION

All of Mrs. Rochelle's grounds for recovery were adequately considered and rejected by the Tennessee Courts; there exists an independent and adequate State ground for the State Court's decision; the Petition is totally devoid of any substantial federal question, and she failed to raise her federal issue at the first opportunity; therefore, the Petition for Writ of Certiorari should be denied and Respondent be awarded damages for the filing of a frivolous appeal.

Respectfully submitted,

CLARENCE E. CLIFTON
120 Exchange Building
Memphis, Tennessee 38103
(901) 526-6767

MAX D. LUCAS, JR.
1910 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 523-7656

Certificate of Service

I do hereby certify that on this 25th day of August, 1978, I have served the foregoing Brief for Respondent in Opposition by mailing three copies of same, postage prepaid, to William H. Fisher, III, 2112 First Tennessee Bank Building, Memphis, Tennessee 38103, Attorney for Petitioner, and Marvin C. Goff, Jr., 2103 Clark Tower, Memphis, Tennessee 38137, Attorney for Respondent.

MAX D. LUCAS, JR.
1910 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 523-7656
Attorney for Respondent,
Jubeth French